Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

SIEMENS ENERGY & AUTOMATION, INC.,

Petitioner,

v.

BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a bankruptcy court has subject matter jurisdiction (thus displacing state court jurisdiction) to determine a state law contract claim arising from a post-reorganization agreement *after* confirmation and consummation of the debtors' plan solely because the plaintiff is the trustee of a product liability trust created by the plan.

RULE 29.1 STATEMENT

The Petitioner is a corporation whose stock is wholly-owned by Siemens Corporation, the stock of which is wholly-owned by Siemens AG, a German corporation. All subsidiaries of the Petitioner are wholly-owned.

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Siemens Energy & Automation, Inc. ("Siemens Energy") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Second Circuit (Ralph K. Winter, J. Daniel Mahoney, and Guido Calabresi, C.J.J.) is duplicated in the accompanying appendix ("Pet. App.") at pages 1a-5a. The court of appeals' order denying Siemens Energy's petition for rehearing with suggestion for rehearing en banc is duplicated in the Appendix at pages 6a-7a. The opinion and order of the District Court for the Southern District of New York, Richard Owen, D.J., is duplicated in the Appendix at pages 8a-9a. The transcript containing the oral opinion of the Bankruptcy Court for the Southern District of New York, Francis G. Conrad, B.J., is duplicated in the Appendix at pages 10a-14a and 36a-40a. The bankruptcy court's order and judgment is duplicated in the Appendix at pages 41a-44a. None of the opinions or orders are officially reported, except the district court's opinion and order is reported on WESTLAW at 1994 WL 577008 and LEXIS at 1994 U.S. Dist. LEXIS 14919 and the court of appeals' decision is reported in a table at 54 F.3d 765 (2d Cir. 1995).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1995. Pet. App. 1a. By order dated and entered June 9, 1995, the court of appeals denied Siemens Energy's timely petition for rehearing with suggestion for

rehearing en banc. Pet. App. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. I, § 8, cl. 4.

"The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

United States Constitution, art. III, § 1.

"The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Section 1334 of the Judiciary Code (28 U.S.C. § 1334).

Section 1334(b) provides, in relevant part, that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings *under title 11*, or *arising in* or *related to* cases under title 11." (Emphasis added.)

Section 157 of the Judiciary Code (28 U.S.C. § 157).

Section 157(a) provides, in relevant part, that the district courts may provide that "any or all proceedings *arising under title 11* or *arising in* or *related to* a case under

title 11 shall be referred to the bankruptcy judges for the district." (Emphasis added.)

Section 157(b)(1) provides, in relevant part, that the bankruptcy judges "may hear and determine . . . all *core* proceedings *arising under title 11*, or *arising in* a case under title 11, referred under subsection (a) of this section." (Emphasis added.)

Section 157(c)(1) provides, in relevant part, that for "a proceeding that is not a core proceeding but that is otherwise *related to* a case under title 11" the bankruptcy judges may only "hear" the proceeding and submit proposed findings and conclusions for de novo review by the article III district court. (Emphasis added.)

The full text of these statutory provisions is set forth in the Appendix at pages 45a-49a.

STATEMENT OF THE CASE

This Court has never spoken to the scope of continuing bankruptcy court jurisdiction after the confirmation and consummation of a reorganization plan. With the circuits now in conflict and "chaos in the case law," this case presents issues of fundamental importance concerning the scope of federal bankruptcy jurisdiction. 4 William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d* § 95:5, at 95-8 (1994) [hereinafter *Norton Bankruptcy Law and Practice 2d*]. Under the law made this spring by the Second Circuit in this case, bankruptcy courts have

become courts of general jurisdiction competent to determine state law claims arising years after confirmation, contrary to the teachings of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and inconsistent with the primary jurisdiction of the state courts to determine state law-governed claims and issues, one of the foundations of this nation's constitutional principle of federalism.

Here, the trustee of the Allis-Chalmers Product Liability Trust[1] – not the debtor or the reorganized debtor – filed a complaint against Siemens Energy in the bankruptcy court, four years *after* confirmation of the debtors' reorganization plan, asserting claims based purely upon state law and a contract made nearly one year *after* confirmation of the plan. Pet. App. 2a; C.A. App. 9-17.[2] The trustee invoked bankruptcy court jurisdiction under Sections 157(a) and 1334(b) of the Judiciary Code (28 U.S.C. §§ 157(a) and 1334(b)). C.A. App. 11.

Siemens Energy contended that the bankruptcy and district courts lacked jurisdiction under Section 1334(b) of the Judiciary Code. Under time honored circuit court authority, Siemens Energy argued that continuing bankruptcy jurisdiction after confirmation and consummation of the reorganization plan was lacking: The bankruptcy court was not being asked to interpret or enforce any

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[1] The plaintiff is the trustee of the Product Liability Trust created under the debtors' plan, and not a chapter 11 trustee nor a bankruptcy trustee of any sort.

[2] References to "C.A. App." are to the joint appendix filed in the court of appeals.

provision of the Bankruptcy Code, the plan, or the confirmation order. Nor was the bankruptcy court needed to aid the implementation of the debtors' long confirmed and consummated reorganization plan, prevent interference with the plan, or protect the order confirming the plan. The court of appeals disagreed, holding that the bankruptcy court has jurisdiction to protect any *entity* that was "integral" to the plan. For the first time, post-confirmation jurisdiction will hinge on the identity of the plaintiff, starkly in conflict with two decisions of the Court of Appeals for the Seventh Circuit. *Cf. Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994); *Pettibone Corp. v. Easley*, 935 F.2d 120 (7th Cir. 1991).

A. Statement of Facts

1. Acquisition, Bankruptcy, and Settlement/ Indemnity Agreement

The Allis-Chalmers Electrical Products Group (the "Electrical Products Group") was an unincorporated division of Allis-Chalmers Corporation ("Allis-Chalmers") until January 1, 1978. At that time, certain of the division's assets were transferred to a newly formed corporation known as Siemens-Allis, Inc., which name was later changed to Siemens Energy. Pet. App. 2a; C.A. App. 46, 654-55.

In 1987, more than nine years later, Allis-Chalmers filed a chapter 11 petition. C.A. App. 10. Siemens Energy filed two proofs of claim to which the debtors objected. Pet. App. 2a; C.A. App. 655. In 1988, the bankruptcy court confirmed a reorganization plan that, among other

things, created two trusts: (1) the Allis-Chalmers Reorganization Trust; and (2) the Allis-Chalmers Product Liability Trust. C.A. App. 11, 45, 655. The reorganization plan was consummated shortly after confirmation in 1988. 11 U.S.C. § 1102; C.A. App. 82, 100.

One year *after* confirmation, the parties made a written agreement (the "Settlement Agreement") in which Siemens Energy agreed to indemnify Allis-Chalmers and both trusts from claims arising from or relating to the conduct of the business of the former Electrical Products Group. Pet. App. 2a; C.A. App. 46, 656. The bankruptcy court approved the Settlement Agreement which was annexed to the bankruptcy court's approval order. Pet. App. 3a. The bankruptcy court's order did *not* incorporate the Settlement Agreement into the terms of the order. Nor did the order expressly retain bankruptcy court jurisdiction over the agreement or any disputes relating thereto. Pet. App. 50a-52a;[3] C.A. App. 166-69.

2. Mr. Rodriguez's Accident and Lawsuit Against Allis-Chalmers

In 1990 – two years after confirmation and consummation of the plan and one year following execution of the Settlement Agreement – a Siemens Energy employee, Terence L. Rodriguez, was seriously injured in a work-related accident at Siemens Energy's Jackson, Mississippi plant. Pet. App. 2a-3a; C.A. App. 46, 658. Mr. Rodriguez

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[3] A copy of the order approving the Settlement Agreement is contained in pages 50a-52a of the Appendix.

came in contact with high voltage electricity while operating a test bench, a piece of equipment used at the Jackson plant to test regulators. C.A. App. 46, 658. The test bench had been designed and manufactured more than twelve years before the accident by the Allis-Chalmers Advanced Technology Group, a division of Allis-Chalmers independent of the Electrical Products Group. C.A. App. 657, 787.

After the accident, Mr. Rodriguez began receiving workers' compensation benefits from Siemens Energy now exceeding $800,000. C.A. App. 48, 660. Mr. Rodriguez also filed a lawsuit against Allis-Chalmers in Rankin County, Mississippi, where the accident occurred. Pet. App. 2a; C.A. App. 659. Mr. Rodriguez alleged that Allis-Chalmers designed, manufactured, tested, advertised and sold the test bench and that it breached its duty to use reasonable care by negligently designing, manufacturing, testing, and selling the test bench. C.A. App. 777-78. That lawsuit remains pending in Mississippi state court; there has been no determination to date that Allis-Chalmers is liable to Mr. Rodriguez on any of the pleaded claims. Pet. App. 2a, 5a; C.A. App. 47. As a result of the confirmation of the Allis-Chalmers reorganization plan, the Product Liability Trust has been substituted as the defendant in place of Allis-Chalmers. C.A. App. 15.

B. Proceedings Below

1. In the Bankruptcy Court for the Southern District of New York

In 1992, four years after confirmation of the reorganization plan, the trustee of the Allis-Chalmers Product

Liability Trust filed an adversary proceeding against Siemens Energy in the bankruptcy court seeking a declaratory judgment that Siemens Energy owed the trust indemnity for Mr. Rodriguez's personal injury claim. Pet. App. 2a-3a; C.A. App. 9-17. Siemens Energy moved to dismiss the bankruptcy court proceeding for lack of subject matter jurisdiction. Pet. App. 2a-3a; C.A. App. 41-171. The trustee cross-moved for summary judgment. C.A. App. 247-510.

The bankruptcy court rendered judgment in favor of the trustee, holding that it had subject matter jurisdiction, that the case was within its "core" jurisdiction and ruling on the merits that Siemens Energy was obligated to defend and indemnify the trust for Mr. Rodriguez's claim. Pet. App. 12a-14a, 36a-39a. The bankruptcy court announced its reasoning in open court at the hearing. The judge ruled that bankruptcy jurisdiction existed because the litigation "will affect whatever the Trustee distributes under the liquidating Trust." Pet. App. 13a. The judge also ruled that the proceeding was a "core" bankruptcy matter subject to his full adjudicatory powers because it "involves [the] interpretation of the plan" and the "post [confirmation] administration of the estate." Pet. App. 14a.[4]

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[4] This ruling came notwithstanding an earlier decision by the same court (by a different bankruptcy judge) holding that, "This is essentially a breach of contract action between non-Debtor parties essentially involving a run-of-the-mill indemnification issue." C.A. App. 571. The judge in that case thus dismissed for lack of subject matter jurisdiction an action brought by another non-debtor against Siemens Energy for indemnification under the same Settlement Agreement.

2. In the District Court for the Southern District of New York

On an appeal taken by Siemens Energy, the district court affirmed the bankruptcy court's judgment, holding that jurisdiction existed because of the "obvious connection between the indemnification agreement in issue, the bankruptcy proceedings, and the Trust which remains under the supervision of the Bankruptcy Court." Pet. App. 8a-9a.

3. In the Court of Appeals for the Second Circuit

The court of appeals affirmed the district court's decision in an opinion on April 13, 1995. Pet. App. 1a-5a. In its opinion, the court of appeals first ruled that the bankruptcy court's exercise of jurisdiction was supported by the "interrelatedness of the Trustee's claim, the reorganization plan and the settlement agreement." Pet. App. 3a. The court of appeals next ruled that bankruptcy jurisdiction existed because the product liability trust was an "integral part" of Allis-Chalmers's reorganization plan and the trust agreement – not the plan – provided that the bankruptcy court had exclusive jurisdiction over the trust and its assets. Pet. App. 3a. The court of appeals ended by ruling that the issues in the litigation were somehow "directly related" to the bankruptcy case and the order approving the Settlement Agreement. Pet. App. 4a.

By order dated June 9, 1995, the court of appeals denied Siemens Energy's petition for rehearing with suggestion for rehearing en banc. Pet. App. 6a.

* * *

None of the courts below found that the outcome of the litigation would have any effect on the bankruptcy estate, which ceased to exist when the plan was confirmed in October, 1988. Other traditional grounds for bankruptcy jurisdiction were also lacking: the lawsuit was not predicated on any provision of the Bankruptcy Code nor was the dispute a case that could exist only in bankruptcy. Nor did the district or circuit courts find that the proceeding was one to enforce or interpret the reorganization plan (which was consummated and implemented long before the Settlement Agreement was executed), the order confirming the plan or the order approving the Settlement Agreement.[5] Finally, the courts did not find that the plan had retained bankruptcy court jurisdiction over the trust or this proceeding or any matter remotely resembling this dispute. *See* Pet. App. 53a-54a;[6] C.A. App 87.

REASONS FOR GRANTING THE PETITION

This Court has never addressed the scope of continuing bankruptcy court jurisdiction *after* confirmation of a reorganization plan, the culminating point in a chapter 11

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[5] The bankruptcy judge claimed that the trustee's action sought to interpret the plan (Pet. App. 14a), but no provision of the plan was ever invoked, enforced or interpreted by any of the lower courts in this case.

[6] The relevant provisions of the Allis-Chalmers plan concerning the retention of bankruptcy court jurisdiction are set forth in the Appendix at pages 53a-54a.

case. With a conflict of circuits and the case law in "chaos"[7], it must now do so. A case last term confirmed that a bankruptcy judge's power and jurisdiction "are cabined by specific and important statutory and constitutional constraints that operate *at every phase* of a bankruptcy." *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1503 (1995) (Stevens, J., dissenting) (emphasis added). The Second Circuit's opinion below contravenes these statutory and constitutional constraints.[8]

This Court has never had occasion to address this issue, because the law at the court of appeals level seemed well settled until recently. Since the early 1940's, post-confirmation bankruptcy court jurisdiction had been

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[7] 4 *Norton Bankruptcy Law and Practice 2d* § 95:5, at 95-8.

[8] In 1984, Congress severely limited the scope of the non-Article III bankruptcy judges' power and jurisdiction in response to this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which struck down as unconstitutional the jurisdictional provisions enacted in the Bankruptcy Reform Act of 1978. With respect to post-confirmation jurisdiction, the statutes offer no specific guidance, because neither the Bankruptcy Code nor the Judiciary Code directly addresses the extent of the bankruptcy court's subject matter jurisdiction after confirmation. 1 *Norton Bankruptcy Law and Practice 2d* § 4:43, at 4-286; Frank R. Kennedy & Gerald Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. Rev. 621, 630 (1993). Nevertheless, it is widely recognized that the "nature and effect of confirmation mandate a significant reduction in the postconfirmation jurisdiction of the Bankruptcy Court." 4 *Norton Bankruptcy Law and Practice 2d* § 95:6, at 95-10; *see also* Ronald W. Goss, *Defining the Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. Contemp. L. 1, 3 (1992) (highly unlikely that Congress intended post-confirmation jurisdiction to be as broad as pre-confirmation jurisdiction).

limited to protecting the confirmation order, preventing interference with implementation of the plan and otherwise aiding or effectuating implementation and consummation of the plan. *See In re Elless Co.*, 174 F.2d 925, 928 (6th Cir.), *cert. denied*, 338 U.S. 824 (1949); *Towers Hotel Corp. v. Lafayette Nat'l Bank*, 148 F.2d 145, 148 (2d Cir. 1945); *North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944); *In re Flatbush Ave.-Nevins St. Corp.*, 133 F.2d 760, 762 (2d Cir. 1943); *Clinton Trust Co. v. John H. Elliot Leather Co.*, 132 F.2d 299, 303 (2d Cir. 1942); *see also* 1 *Norton Bankruptcy and Law Practice 2d* § 4:43, at 4-287; Lawrence P. King, *Collier on Bankruptcy* ¶ 1142.01[1], at 1142-4 n.5a (15th ed. 1995). With no definitive precedent from this Court on the issue, *Peerless* and its progeny set the boundaries of post-confirmation bankruptcy court jurisdiction for the past fifty years.[9]

In this case, the Second Circuit ignored this law. Without discussion of these issues or authorities, the court of appeals applied a new series of tests to find that subject matter jurisdiction existed. In direct conflict with recent authority from the Seventh Circuit, the Second Circuit's opinion gives bankruptcy courts expansive new powers to determine post-confirmation contract disputes, a jarring departure from the law of post-confirmation bankruptcy jurisdiction developed over the last fifty

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[9] There is no indication that Congress intended to change this time honored body of case law when it enacted the Bankruptcy Code in 1978, as amended. *See Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) (Congress not deemed to have changed pre-1978 Bankruptcy Code law absent indication that Congress intended such a change).

years. The Second Circuit held for the first time at the court of appeals level that the identity of the plaintiff is sufficient unto itself to confer continuing (and perhaps never-ending) bankruptcy jurisdiction, thereby displacing state court jurisdiction. Before now, the existence of post-confirmation jurisdiction turned on the nature of the issues in the lawsuit (i.e., was the court asked to interpret the plan or would the outcome aid in consummating the plan?), not the plaintiff's identity.

Under the Second Circuit's new rule, bankruptcy courts have become courts of general jurisdiction hearing any disputes concerning the post-confirmation activities of a trust, a reorganized debtor, or any entity that is fundamental to the plan. Taken to its logical conclusion, the Second Circuit's rationale means that the bankruptcy courts can continue to exercise jurisdiction long after confirmation to determine disputes of any nature, so long as one of the parties is responsible for making payments to creditors under the confirmed plan.

The Second Circuit's opinion on post-confirmation jurisdiction is directly in conflict with the Seventh Circuit's *Zerand* and *Pettibone* decisions and is at odds with the Norton treatise, a leading commentator on bankruptcy law. The Second Circuit also silently argues with the principles enunciated by this Court in *Northern Pipeline* and *Celotex*. The Second Circuit holds that it is entirely proper for a non-Article III bankruptcy judge to entertain and decide a pure state law action on a contract made after the debtor had exited bankruptcy under a reorganization plan, contrary to the teachings in *Northern Pipeline*. Beyond that, the Second Circuit finds it appropriate for the bankruptcy judge to decide this dispute

which none of the courts have found could have any impact on the debtor or the debtor's estate, the linchpin for bankruptcy jurisdiction under *Celotex*.

The ramifications are substantial and troubling. The Second Circuit's decision turns bankruptcy courts into courts of general jurisdiction whenever a trust created under a plan has a post-confirmation dispute with anyone, even when the dispute involves only state law-governed issues involving a post-confirmation contract. In this case, the trust will live for as long as forty years. C.A. App. 383. Under the Second Circuit's decision, we may expect that the bankruptcy court will resolve all of the trust's contractual or other disputes with third parties for decades to come.

Moreover, the Second Circuit's decision threatens to undermine the boundaries between federal and state jurisdiction and is contrary to the trend to restrict federal court jurisdiction to federal claims and issues. In *United States v. Lopez*, 115 S. Ct. 1624, 1633 (1995), this Court recently reaffirmed that the Constitutionally enumerated powers "are interpreted as having judicially enforceable outer limits . . . . " Notwithstanding "that Congress does have substantial discretion and control over the federal balance [between federal and state spheres], . . . this Court has participated in maintaining the federal balance through judicial exposition of . . . the rules for determining the primacy of state law. . . . " 115 S. Ct. at 1639 (Kennedy, J., concurring). Thus, the Congressional power to enact a "uniform" bankruptcy law is not to be recognized as usurping primary state court jurisdiction to determine state law-governed claims and issues. As suggested by Justice Thomas, federal statutory power under

the Bankruptcy Clause is no more expansive than under the Commerce Clause. *See* 115 S. Ct. 1644, 1646 (Thomas, J., concurring).

The impact of the decisions here may be felt throughout the nation.[10] Many large and small reorganizations are accomplished with the creation of a trust or the use of a purchaser or investor to acquire the debtor or fund the plan. Until now, post-confirmation bankruptcy jurisdiction was limited to matters relating to the plan implementation and was not based on the plaintiff's identity. The decision by the Second Circuit creates an incentive for the use of reorganization trusts, which will automatically bring bankruptcy jurisdiction with them, all contrary to the teachings that the bankruptcy courts must not keep reorganized firms in perpetual "tutelage." *North Am. Car Corp. v. Peerless Weighing & Vending Mach. Corp.*, 143 F.2d 938, 940 (2d Cir. 1944).

I

THE DECISION OF THE SECOND CIRCUIT CONFLICTS WITH RECENT DECISIONS OF THE SEVENTH CIRCUIT

The Second Circuit's opinion not only is in conflict in outcome and approach with Seventh Circuit decisions,

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[10] Although the Second Circuit stated that its decision is not to be relied upon in unrelated cases in any court, the decisions of the bankruptcy and district courts may be relied upon (and may be cited as affirmed by the Second Circuit).

but it also disagrees with the Norton treatise.[11] In *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991), the Seventh Circuit followed the long-standing authority that the confirmation of a plan frees the debtor from bankruptcy court supervision and protection. Judge Easterbrook for the Seventh Circuit stated that, "Only a belief that bankruptcy is forever could produce a case such as this." *Id.* at 121.

In *Pettibone*, after confirmation of its plan, the reorganized debtor sought to enjoin state court lawsuits allegedly filed in violation of the bankruptcy stay under Section 362 of the Bankruptcy Code, 11 U.S.C. § 362. If the lawsuits were enjoined, the Seventh Circuit noted that distributions to the other creditors under the plan might have been increased. 935 F.2d at 121. But since the new proceedings in the bankruptcy court did not directly enforce the plan, the Seventh Circuit dismissed for lack of jurisdiction, even though the outcome might have had an indirect effect on creditors' recovery.

Under the Second Circuit's rule, the dispute in *Pettibone* would have been subject to bankruptcy court jurisdiction because the lawsuits might have affected what other creditors were to receive under the plan in the future and were directly related to issues in the bankruptcy case. To the Seventh Circuit, a company that has emerged from bankruptcy is just like any other party and

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[11] The Fourth Circuit is also in conflict since in dicta that court indicated that post-confirmation jurisdiction under the Bankruptcy Code is limited to matters concerning the implementation of the plan. *Goodman v. Phillip R. Curtis Enters., Inc.*, 809 F.2d 228, 232 (4th Cir. 1987).

must protect its rights as provided by applicable non-bankruptcy law. *Id.* The Seventh Circuit did not say that the reorganized debtor was entitled to no relief in a state court or a federal court under diversity jurisdiction; the court only meant that the post-bankruptcy entity "may not come running to the bankruptcy judge every time something unpleasant happens." *Id.* at 122.

More recently, in *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159 (7th Cir. 1994), the Seventh Circuit held that a purchaser vested with the estate's assets under a plan could *not* invoke the post-confirmation jurisdiction of the bankruptcy court to enjoin a product liability lawsuit based on a state law theory of successor liability. The court held there was no such post-confirmation jurisdiction despite (a) provisions in the plan, the sale agreement and the various orders providing that the sale was free of the very product liability claim asserted against the purchaser, enjoining such claims, and that the bankruptcy court specifically retained jurisdiction, *id.* at 161 and 164,[12] and (b) that the sale, which had funded the plan and payment to creditors might now be rescinded, "ripping the bankruptcy open." *Id.* at 164.

The Seventh Circuit held that jurisdiction was lacking because the plan already had been implemented. *Id.* at

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[12] The Seventh Circuit ruled that, "A court cannot write its own jurisdictional ticket." *Id.* at 164. Thus, the Seventh Circuit would not be impressed with the fact that the trust agreement in the Allis-Chalmers case provided for bankruptcy court jurisdiction over the trust and its assets. Pet. App. 3a. For if a bankruptcy court cannot create jurisdiction where none exists, neither can the debtor and the trust by agreement.

162. That is not to say that the court found that there was no connection between the issues in the post-confirmation dispute and the issues in the bankruptcy case. There was a connection – in the Second Circuit's words, an "interrelatedness" – between the issues in the litigation, the plan and the bankruptcy case. The connection and relatedness were just too tenuous. Judge Posner noted that the federal interest in resolving claims with a distant federal origin becomes progressively weaker as the dispute becomes remote from the concerns of the body of federal law claimed to confer federal jurisdiction. The federal interest was extremely weak at that point since the bankruptcy was over. *Id.*

Under *Zerand*, the Seventh Circuit undoubtedly would have dismissed the trustee's action against Siemens Energy, because the Settlement Agreement was made one year after consummation of the plan, did not and could not involve the implementation of any term of the plan and therefore bears an even more tenuous relationship to the plan and the bankruptcy case. If the Seventh Circuit found no federal interest existed warranting bankruptcy court resolution of the issues in *Zerand*, it certainly would have dismissed the pure state law-governed post-confirmation contract claim in this case. The conflict between the circuits is plain.

In a recent pre-confirmation case where jurisdiction understandably is more likely to exist, the Seventh Circuit again dismissed, rejecting arguments similar to those advanced here. *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994). In the lower courts in *Steinberg*, jurisdiction was not litigated, evidently because the bankruptcy trustee was the plaintiff in an action to pierce the corporate veil

and hold the shareholders responsible for a large debt of the corporate debtor. Like the Second Circuit's decision, the lower courts in *Steinberg* presumed jurisdiction because of the identity of the plaintiff. Going beyond the identity of the plaintiff, the Seventh Circuit raised jurisdiction *sua sponte*, dismissing because recovery by the trustee would directly benefit a third party creditor of the debtor and not the estate.

Thus, *Steinberg* confirms the principle that lack of benefit to the estate[13] will result in there being no bankruptcy jurisdiction even though success in the lawsuit would indirectly bring other creditors a larger distribution. Under the Second Circuit's reasoning, jurisdiction would have existed in *Steinberg* because the trustee was the plaintiff and the lawsuit could have indirectly affected creditor recoveries.

Finally, the Norton treatise, one of the leading bankruptcy treatises, discusses the very issue confronted in this case: the extent of bankruptcy jurisdiction over post-confirmation disputes between a trust and others. The Norton treatise states that the initial vesting activities with respect to a trust created under a plan may require the bankruptcy court's jurisdiction under Section 1142(b) of the Bankruptcy Code – which provides for bankruptcy

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[13] As discussed at pages 25-26, *infra*, there could be no benefit to the estate here because the estate ceased to exist at confirmation. On confirmation, all of the assets of the former bankruptcy estate revested in the reorganized debtor and then certain of the reorganized debtor's assets were transferred to the trusts created under the plan. 11 U.S.C. §§ 1141(b) and (c); C.A. App. 81-83.

court authority to compel implementation of the plan and execution of instruments necessary to the plan. After the trust is vested with its assets, the Norton treatise states that the trust operates under state law, not federal bankruptcy law, and that the bankruptcy court is without extensive continuing jurisdiction except where the action involves implementation of the plan. 4 *Norton Bankruptcy Law and Practice 2d* § 95:8, at 95-17. The Second Circuit reached the opposite conclusion, finding broad continuing jurisdiction in the bankruptcy court.

* * *

In sum, the court of appeals below set itself in conflict with the Seventh Circuit (and the Norton treatise) both in result and principle by abandoning the earlier authority that bankruptcy jurisdiction after confirmation of a plan is limited to actions protecting the confirmation order, preventing interference with the implementation of the plan and otherwise aiding or effectuating the implementation and consummation of the plan. The Second Circuit appears to have invited this Court's review on an issue never addressed by the Court.[14]

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[14] Upon a grant of certiorari, the Court must decide the case on the grounds of bankruptcy jurisdiction, because ancillary jurisdiction does not exist under *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1677 (1994) to enforce a settlement agreement. The Settlement Agreement here is not incorporated into the terms of the order approving the agreement. Nor does the order retain jurisdiction in the bankruptcy court to interpret, enforce or otherwise resolve disputes pertaining to the Settlement Agreement. In fact, the Court's teaching in *Kokkonen* – that enforcement of settlement agreements made in federal court actions is for the state courts unless there is some independent

II

THE COURT OF APPEALS' DECISION IS CONTRARY TO THE TEACHINGS OF THIS COURT ON THE SCOPE OF BANKRUPTCY JURISDICTION

The Second Circuit's decision is also inconsistent with the constitutional limits on a bankruptcy judge's power laid down by this Court in *Northern Pipeline* and *Celotex*. These limits are set forth in the concurring opinion by Justices Rehnquist and O'Connor in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which struck down the grant of jurisdiction to the extent the statute allowed the non-Article III bankruptcy judges to entertain and decide pure state law claims that otherwise would be decided by a state court or Article III federal district court but for the filing of a bankruptcy petition by the debtor. 458 U.S. at 91 (Rehnquist, J., concurring in judgment).[15]

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basis for federal jurisdiction – is consistent with Siemens Energy's arguments in this case.

[15] The 1978 jurisdictional scheme struck down in *Northern Pipeline* empowered bankruptcy courts to decide a wide variety of cases involving state law claims as well as those based on federal law. 458 U.S. at 54 (plurality opinion). The 1978 statute, however, did not make the bankruptcy judges Article III judges with life tenure and the guaranteed salary that the Constitution affords Article III judges. 458 U.S. at 55 (plurality opinion). The plurality opinion in *Northern Pipeline* broadly ruled that the 1978 statute was unconstitutional because the powers conferred on the bankruptcy courts authorized exercise of the essential attributes of the judicial power of the United States, which may be conferred under Article III only on life-tenured judges having salary protection. 458 U.S. at 87 (plurality opinion).

Losing sight of these constitutional principles, the court of appeals here allows a pure state law contract claim to be adjudicated fully and finally by the bankruptcy judge, despite the undisputed fact that the claim by the trustee against Siemens Energy, lying at the core of Article III judicial power, involves only "private rights" similar to the debtor's contract claims in *Northern Pipeline*. 458 U.S. at 70-72 (plurality opinion). The court of appeals compounded this error by affirming decisions which held that the adversary proceeding was a *"core"* proceeding under 28 U.S.C. § 157(b) that the bankruptcy judge could finally determine.[16]

Turning a pure breach of contract action into a matter within the core jurisdiction of the bankruptcy court cannot be reconciled with the Court's teaching in *Northern Pipeline* that a bankruptcy judge's determination of a pure state law contract claim violated Article III of the Constitution. The only difference is that the defendant in *Northern Pipeline* was sued on a contract made prior to the

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[16] Responding to *Northern Pipeline*, the Bankruptcy Amendments and Federal Judgeship Act of 1984 was enacted. Congress grounded bankruptcy jurisdiction in the Article III district courts (*see* 28 U.S.C. §§ 1334(a) and (b)), but allowed the district courts to "refer" bankruptcy cases and proceedings to non-Article III bankruptcy judges. 28 U.S.C. § 157(a). In turn, Congress granted non-Article III bankruptcy judges the power to hear and decide *only* those *"core* proceedings *arising under title 11*, or *arising in* a case under title 11." 28 U.S.C. § 157(b)(1) (emphasis added). For non-core proceedings, "otherwise *related to* a case under title 11," the bankruptcy judges may only hear the proceedings and submit proposed findings and conclusions for de novo review by an Article III district court. 28 U.S.C. § 157(c)(1) (emphasis added).

bankruptcy case, while Siemens Energy was sued here on a contract made after the reorganization plan had been confirmed and consummated, freeing the debtor from the tutelage of the bankruptcy court. The difference is without a distinction since both lawsuits involve only state law claims and contracts made outside of the bankruptcy case.

Besides deviating from *Northern Pipeline*, the rulings in this case differ from the commentators and leading circuit case defining what is "core." Although this Court has not spoken on the issue, the leading circuit authority and the commentators hold that a "core" proceeding is one that could exist only in a bankruptcy case or is predicated on a provision of title 11. *See, e.g., In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987); 1 *Norton Bankruptcy Law and Practice 2d* § 4:38, at 4-229-234; 1 Lawrence P. King, *Collier on Bankruptcy* ¶ 3.01[iii], at 3-36 and ¶ 3.01[v], at 3-31-32 (15th ed. 1995). The trustee's contract claim thus could not be "core" because it certainly could exist outside of a bankruptcy case and neither arose under title 11 nor in the bankruptcy case.

This litigation clearly is not predicated on any provision of title 11: One need only note that none of the trustee's claims against Siemens Energy are based on a provision of title 11. Nor is any claim one that could exist only in a bankruptcy. This is a garden variety contractual dispute – as in *Northern Pipeline* – not a dispute peculiar to bankruptcy. Moreover, a claim simply cannot arise in a bankruptcy case when the plan was confirmed and consummated four years earlier.

The Second Circuit's decision also cannot be squared with the teachings in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), handed down after the Second Circuit rendered its decision here.[17] In *Celotex*, the Court spoke to the boundaries of "related to" jurisdiction under 28 U.S.C. § 1334(b), the outer perimeter of bankruptcy jurisdiction under the existing statute. Related proceedings are *non-core* proceedings that do not "arise under" a provision of title 11 or "arise in" a title 11 case. *See* 28 U.S.C. § 157(c)(1).

The Court's decision in *Celotex* teaches that an impact on the debtor's bankruptcy estate and the debtor is the linchpin for "related to" bankruptcy jurisdiction under 28 U.S.C. § 1334(b). *See also In re Boone*, 52 F.3d 958, 960-61 (11th Cir. 1995); *In re Walker*, 51 F.3d 562, 568-69 (5th Cir. 1995). In *Celotex*, the Court ruled first that related proceedings are (1) causes of action that belong to the debtor which become property of the *estate* at the bankruptcy filing (such as the action in *Northern Pipeline*) and (2) suits between third parties which have an effect on the *estate*. 115 S. Ct. at 1498 n.5 (emphasis added).

The Court next agreed with the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), that Congress intended to grant the bankruptcy courts comprehensive

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[17] The Second Circuit's decision was handed down on April 13, 1995. The Court's *Celotex* decision was rendered on April 19, 1995. The Court may wish to consider granting the petition for certiorari, vacating the decision below and remanding the case to the court of appeals for further consideration in light of the *Celotex* holding which links jurisdiction to an effect on the bankruptcy estate, discussed *infra*.

jurisdiction to deal with "all matters connected with the *bankruptcy estate.*" 115 S. Ct. at 1499 (emphasis added).[18] The Court flatly stated that whatever test for "related to" jurisdiction is used, it is "clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." 115 S. Ct. at 1499.

This case gives the Court an opportunity to address a question left open in *Celotex*, namely, when is there an effect on the debtor or its estate? Is there the jurisdictional equivalent of an effect on the estate if there is an effect on the entity that inherits the estate from the debtor?

Here, the debtor and the reorganized debtor are not affected regardless of whether or not Siemens Energy indemnifies the trust against Mr. Rodriguez's claims. Neither the debtor nor the reorganized debtor can have any liability in the Mississippi action because the Allis-Chalmers plan provides that the trust will bear the responsibility for product liability claims. C.A. App. 76-77, 80.

Nor can there be any effect on the estate. Under the Allis-Chalmers plan, all of the assets of the bankruptcy estate revested in the reorganized debtors on confirmation. C.A. App. 81. Then, certain assets of the reorganized debtors were transferred to the trusts created under the plan. C.A. App. 83. Therefore, the bankruptcy estate no longer exists after confirmation of the plan. 11 U.S.C.

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[18] The Court cited *Pacor* with approval in *Celotex*, although it did not expressly adopt *Pacor's* "conceivable effect on the estate" test for "related to" jurisdiction.

§§ 1141(b) and (c); 1 *Norton Bankruptcy Law and Practice 2d* § 4:43, at 4-286 (by operation of law, the bankruptcy estate ceases to exist upon confirmation); Frank R. Kennedy & Gerald Smith, *Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings*, 44 S.C. L. Rev. 621, 634 (1993) ("there is no longer any property of the estate after confirmation absent a plan provision delaying the revesting of title in the debtor or its transfer pursuant to the plan"); Ronald W. Goss, *Defining the Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. Contemp. L. 1, 14 (1992) (bankruptcy estate ceases to exist by operation of law upon plan's confirmation).

Because the estate ceased to exist seven years ago, the outcome of the trustee's litigation can have no effect on the estate. *Cf.* 4 *Norton Bankruptcy Law and Practice 2d* § 95:10, at 95-20 (courts should recognize that plan confirmation marks a new stage in the case and should "only take jurisdiction over related cases when there is an independent remedial basis for doing so or when the resolution of the matter is absolutely central to recovery by prepetition creditors"); Ronald W. Goss, *Defining the Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. Contemp. L. 1, 27 (1992) (bankruptcy courts should not interpret "related to" jurisdiction under 28 U.S.C. § 1334(b) to include any post-confirmation dispute that will yield some recovery to the reorganized debtor; "related to" jurisdiction after plan confirmation should be limited to matters affecting plan's implementation); Rhett G. Campbell, *Postconfirmation Jurisdiction*, 1 J. of Bankr. L. & Prac. 94, 97 (1991) ("There is a serious question as to whether there can be Section 1334(b) jurisdiction after confirmation of the plan, because there is no 'estate.' ").

* * *

In sum, this pure state law, breach of contract action which can have no effect on the debtor or the estate was determined by a non-Article III bankruptcy judge. This result cannot be reconciled with the principles enunciated by this Court in *Northern Pipeline* and *Celotex* concerning the outer limits of bankruptcy jurisdiction. If left to stand, the decision below will provide bankruptcy jurisdiction to whomever inherits the bankruptcy estate, for years or even decades following bankruptcy.

III

WITH A SPLIT IN THE CIRCUITS ON AN ISSUE THAT HAS NEVER BEEN SETTLED BY THE COURT, THE PUBLIC INTEREST REQUIRES THE COURT'S REVIEW BECAUSE THERE IS "CHAOS" IN THE LOWER COURTS, ACCORDING TO A COMMENTATOR

Embracing the trustee's argument that a reorganization trust is an extension of the bankruptcy court not designed to exist without bankruptcy court protection, the court of appeals adopted a new concept of post-confirmation jurisdiction, unsettling the law at the court of appeals level. In the lower courts, the law already was unsettled, with one leading commentator saying that the different philosophies expressed by some bankruptcy courts and a failure of some even to consider the issues "has created chaos in the case law." 4 *Norton Bankruptcy Law and Practice 2d* § 95:5, at 95-8.

The Court's guidance is imperative because the extent of post-confirmation jurisdiction in bankruptcy

cases is an important question of federal jurisdiction and an issue significant to the administration of bankruptcy cases.

Reorganized debtors, trusts, purchasers of assets, and investors often attempt to maintain the "home court advantage" after confirmation so that disputes will continue to be decided in a debtor friendly forum. 4 *Norton Bankruptcy Law and Practice 2d* § 95:5, at 95-8; Ronald W. Goss, *Defining the Scope of Retained Jurisdiction in Chapter 11 Plans*, 18 J. Contemp. L. 1, 30 (1992). Thus, post-confirmation disputes land in the bankruptcy court in virtually all chapter 11 cases. *Id.* at 2. Subject matter jurisdiction itself is a threshold issue that must be confronted by the courts in every case, sometimes *sua sponte*. *See Andrus v. Charlestone Store Prods. Co.*, 436 U.S. 604, 608 n.6 (1978).

Moreover, trusts have become a common tool in bankruptcy cases in recent years. Many large reorganizations – such as Johns-Manville – have used and will continue to use trusts as a means of allowing the reorganized debtor to confirm a plan and exit chapter 11 when a multitude of tort claims are and will be asserted for years to come. More such trusts no doubt will be created, perhaps in the recently commenced Dow Corning case. Also, the use of trusts in plans that provide for the liquidation of the debtor under a plan is very common. 4 *Norton Bankruptcy Law and Practice 2d* § 95:8, at 95-17. In the last five years alone, trusts have been included in plans filed in more than fifty chapter 11 cases,

counting only debtors having more than $50 million in assets.[19]

The Second Circuit's decision likely will create an incentive for trusts – as well as reorganized debtors, acquirors of assets and the like – to bring all of their post-confirmation disputes to the bankruptcy courts for resolution, even where the disputes involve pure state law or contracts made after confirmation. This will put a severe strain on the already overburdened bankruptcy system.[20]

Moreover, the Second Circuit's decision may make business persons reluctant to deal with a reorganized debtor or entities connected with a plan. They may be concerned that they will find themselves before the bankruptcy courts in the event of a dispute, rather than in a state or federal district court. The bankruptcy laws should not lead them to avoid reorganized debtors and trusts, a result at odds with the fundamental principle that bankruptcy offers a "fresh start" for the debtor. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

Put simply, the efficient functioning of a nationwide bankruptcy system, which is constitutionally mandated to uniform, cannot be fostered where inconsistent decisions on the fundamental, threshold question of subject

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[19] This information can be gleaned from a database known as "The Bankruptcy Datasource, Plan Summary" on LEXIS which contains summaries of only those plans filed in cases in which the debtor has assets in excess of $50 million.

[20] The Administrative Office of the United States Courts reported in a press release issued on March 22, 1995 that over 800,000 bankruptcy filings have been made each calendar year from 1991 through 1994.

matter jurisdiction emanate from the lower courts predicated simply on the fortuities of forum and venue and where significant judicial and party resources are expended at the lower court levels on this recurring issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 6, 1995

Respectfully submitted,

LAWRENCE W. BOES

Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13 day of April, one thousand nine hundred and

Present:
Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Honorable Guido Calabresi,
Circuit Judges.

In Re: HARTMAN MATERIAL HANDLING SYSTEMS, INC.; ALLIS-CHALMERS CORPORATION, d/b/a American Air Filter Company, Inc.,
Debtors.

ORDER
#94-5079

(Filed
Apr. 13, 1995)

BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST,
Plaintiff-Appellee,

v.

SIEMENS ENERGY & AUTOMATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Siemens Energy & Automation, Inc. ("Siemens") appeals Judge Owen's affirmance of the bankruptcy court's order requiring Siemens to indemnify the Allis-Chalmers Products [sic] Liability Trust (the "Trust") in a personal injury lawsuit brought by Terence Rodriguez. Rodriguez's lawsuit is currently proceeding in Mississippi state court. Siemens argues that: (i) the bankruptcy court did not have subject matter jurisdiction to hear this case, (ii) Siemens is not obligated to indemnify the Trust for Rodriguez's injuries, and (iii) the Trust may not seek indemnity until there is a finding of liability in the Mississippi case.

This case arises from the Chapter 11 bankruptcy proceedings of the Allis-Chalmers Corporation and related entities. Siemens had acquired certain assets of the Allis-Chalmers Electrical Products Group ("EPG") in 1978 and filed two proofs of claim in the bankruptcy proceedings. Allis-Chalmers and Siemens settled Siemens's claims in an agreement (the "settlement agreement") entered a year after the debtor's reorganization plan was confirmed. The settlement agreement provided that Siemens would indemnify Allis-Chalmers, the Reorganization Trust, and the Product Liability Trust from all claims and liabilities related to the conduct of the business of the EPG. Rodriguez, an employee of Siemens, was injured due to

an alleged defect in a piece of equipment called a "test bench." The test bench was manufactured by Allis-Chalmers but was one of the assets transferred by the EPG to Siemens. Because the test bench was formerly owned by the EPG, the Trust sought and won a declaratory judgment that the terms of the settlement agreement required Siemens to defend and indemnify the Trust in the Rodriguez case.

Siemens contends that the bankruptcy court lacked subject matter jurisdiction because: (i) the parties to this suit are non-debtors, (ii) the issues are not related to the bankruptcy laws, (iii) Siemens's alleged obligation to indemnify the Trust is based on a settlement agreement entered one year after the debtor's reorganization plan was confirmed, and (iv) the suit does not attempt to effectuate or implement the reorganization plan. We believe, however, that the interrelatedness of the Trustee's claim, the reorganization plan and the settlement agreement supports the bankruptcy court's exercise of jurisdiction.

The bankruptcy code provides for post-confirmation jurisdiction in order for the court to require a party to "perform any . . . act . . . that is necessary for the consummation of the plan." 11 U.S.C. § 1142(b). The establishment and administration of the Trust was an integral part of Allis-Chalmers's reorganization plan, and the Trust Agreement provides that the bankruptcy court "shall have exclusive jurisdiction over the Trust, the Trustee and the Trust Assets as provided for in the Plan." The settlement agreement, which settled Siemens's claims against the debtor, was approved by the bankruptcy court and was annexed to an order of the bankruptcy court.

The bankruptcy court's order stated: "IT IS HEREBY ORDERED: . . . That Allis-Chalmers, the Reorganization Trustee and the Product Liability Trustee be and hereby are authorized and empowered . . . to implement and effectuate the Settlement Agreement approved hereunder." Based on the abundant evidence that the issues in this case are directly related to the bankruptcy proceedings and an order of the bankruptcy court, we believe that the bankruptcy court had subject matter jurisdiction over this dispute. We find unpersuasive Siemens's argument that, under 28 U.S.C. § 157(a) and the standing order of reference for the Southern District of New York, there can be no "related to" jurisdiction after confirmation. *See* 8 Collier on Bankruptcy ¶ 3022.03, at 3022-3 n.4 (15th ed. 1995) ("Rule 3020(d) makes clear that administration of an estate may continue after confirmation").

Siemens contends that the indemnity award should be reversed because the Trustee failed to show that "the conduct of the business of the former Electrical Products Group included the design, manufacture, construction, fabrication, assembly, testing, advertising or selling of the test bench [Rodriguez] was using at the time of his injury." Siemens's contention, however, misapprehends the language in the settlement agreement. The indemnification clause requires Siemens to indemnify the Trust "from any and all claims, losses, expenses or liabilities of any kind or nature now in existence or hereafter arising from, or relating to, the conduct of the business of the former Allis-Chalmers Electrical Products Group." It is undisputed that the test bench at issue in the Rodriguez case was owned and used by the EPG and was included in the transfer of assets to Siemens in 1978. Thus,

Rodriguez's personal injury claim "arises from" or is "related to" the conduct of the business of the former Electrical Products Group, and Siemens must indemnify the Trust. The granting of summary judgment in favor of the Trust was therefore appropriate.

Finally, we do not believe that the granting of summary judgment in favor of the Trust was premature. Siemens's obligation to indemnify the Trust is not contingent on a finding of liability in the Mississippi case, for Siemens is responsible for "expenses" as well as damages. Moreover, the declaratory judgment requires Siemens to defend the Mississippi action.

We therefore affirm.

/s/ Ralph K. Winter
Hon. Ralph K. Winter,
U.S.C.J.

/s/ J. Daniel Mahoney
Hon. J. Daniel Mahoney,
U.S.C.J.

/s/ Guido Calabresi
Hon. Guido Calabresi,
U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9 day of June one thousand nine hundred and ninety-five.

In Re: **HARTMAN MATERIAL HANDLING SYSTEMS, INC.; ALLIS-CHALMERS CORPORATION, d/b/a AMERICAN Air Filter Company, Inc.,**
Debtors.

DOCKET NO. 94-5079

(Filed Jun. 9, 1995)

BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST,
Plaintiff-Appellee,

v.

SIEMENS ENERGY & AUTOMATION, INC.,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by **Appellant SEIMENS [sic] ENERGY & AUTOMATION, INC.,**

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
By: /s/ Beth J. Meador 6/9/95
Beth J. Meador Date
Administrative Attorney

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re	
HARTMAN MATERIAL HANDLING SYSTEMS, INC., ALLIS-CHALMERS CORPORATION, d/b/a AMERICAN AIR FILTER COMPANY, INC., et al., Debtors.	MEMORANDUM AND ORDER 93 Civ. 5734 (RO) Chapter 11 Case Nos. 87 B 11225 through 87 B 11242 inclusive (BRL)
BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST, Plaintiff-Appellee, -v- SIEMENS ENERGY & AUTOMATION, INC., Defendant-Appellant.	

OWEN, District Judge

Having heard argument by the parties on June 3, 1994 on the issue of whether defendant Siemens is obligated to indemnify plaintiff in the action of *Rodriguez v. Allis-Chalmers Corporation et al.*, I affirm the Order and Judgment of Bankruptcy Judge Francis Conrad in the oral opinion below. Because of the obvious connection between the indemnification agreement in issue, the bankruptcy proceedings, and the Trust which remains

under the supervision of the Bankruptcy Court, that Court had subject matter jurisdiction to decide this issue. Moreover, I concur with Judge Conrad's finding that the indemnification provision states unambiguously that Siemens had contractually agreed to indemnify the Trust for the claims at issue.

It is so ordered.

Dated: New York, New York
October 19, 1994

Richard Owen
United States
District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter
of
HARTMAN MATERIAL HANDLING SYSTEMS/ALLIS-CHALMERS CORP.,
Debtor.

Case No
87 B 11225
(92-1029)

---------- x

July 8, 1993

United States Custom House
One Bowling Green
New York, New York 10004

Bruce W. Stauberg [sic], Trustee v. Siemens Energy and Automation, Inc.; Mtn. by Siemens Energy & Automation Inc. to dismiss Complaint for lack of jurisdiction and improper venue or in the alternative, for abstention; Defendant's notice of cross-motion for summary judgment; Affidavig [sic] of James J. Malia and Margaret R. Buker in opposition to Plaintiff's cross-motion and in support of Defendant's cross-motion; notice of cross-motion by Plaintiff for Summary Judgment.

BEFORE:

HON. FRANCIS G. CONRAD,
Bankruptcy Judge.

[p. 2] APPEARANCES:

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[p. 3] PROCEEDINGS

MR. ROCHELLE: I presume, Your Honor, being as we have motions for both lack of jurisdiction, dismissal under 12(b)(6) and for summary judgment, it makes some logical sense first to address jurisdiction.

THE COURT: Why don't I do this. Why don't – I will let you go first and I will give you about ten minutes, then you can have about ten minutes, then I will make my ruling.

You can argue the whole thing.

MR. ROCHELLE: I think I know what that means.

THE COURT: Do you want to waive your argument under 12(b)(6) and jurisdiction or would you like me to just rule and hear your argument on the indemnity?

MR. ROCHELLE: Not really, because I think there's a couple of very intriguing issues with which we might have some discussion on jurisdiction and the 12(b)(6) issue.

I won't go through everything, because [p. 4] obviously the Court has read our papers pretty thoroughly, so I won't bore you.

THE COURT: Let me do this, let me save you the time, because I have looked at them very carefully.

In reference to the 12(b)(6) motion, I think the law is very, very clear. The purpose of a Motion to Dismiss is merely to assess the legal feasibility of the Complaint and not to assay the weight of the evidence which might be offered in support thereof.

Now, in this particular case we had a Chapter 11, we had a Plan of Reorganization confirmed, we had a settlement agreement.

What this adversary proceeding seeks simply is a declaratory judgment.

I think that's a cause of action and so the 12(b)(6) motion is denied; I don't think there is enough certainly in the well pled pleadings of the Trustee to sustain that.

Now, in reference to the subject matter jurisdiction, the plan and the Confirmation Order expressly provide that jurisdiction would be retained for specific purposes.

[p. 5] Concerning those, it's almost boilerplate to enter such orders as they may be necessary or appropriate in aid of confirmation and to facilitate implementation of the plan.

Bankruptcy Courts have a strong interest in successful reorganization and supporting a plan.

This is not one of those cases where the Bankruptcy Court is keeping the Debtor in unnecessary tutelage, as the cases have been cited to us.

The fact of the matter is that the motion – this particular motion, particularly by the Trustee, will affect whatever the Trustee distributes under the liquidating Trust.

So I think that subject matter jurisdiction exists.

In reference to venue, that's not an easy issue here. Siemens raises the 1409(d) issue. When you first grab onto that issue, it does have some merit here.

Most of the events in reference to Mr. Rodriguez' claim take place in Mississippi, et cetera, but the thing that is really very important [p. 6] here is that this settlement agreement was approved by the Bankruptcy Court in the Southern District of New York.

It's a postconfirmation settlement agreement. In that case, the Court I think has – and I think this is where the jurisdiction lies – the parties came here as a result of a Plan of Reorganization – so I think that the 1391(b)(2) venue is proper and the 1409(d) is not proper.

Moreover, I think to sustain the venue would be just simply to tell the Trustee "Go spend more money and go

down to Mississippi or Georgia, wherever you are, and run through this same route again."

This issue has been – well, in fact, it's been more than well briefed by the parties, and concerning the matter of judicial economy, to switch the venue now I think is too late.

Now, the other issue which was raised was the – whether this was a core proceeding.

This Court has ruled on in re: Cuyahoga Trenching, which was an Eastern District of New York case, that when you have matters which arise postpetition, in that case, preconfirmation, we [p. 7] indicated that's a core matter.

I think that, again, this involves interpretation of the plan, I think it involves the post administration of the estate and therefore, that it is a core proceeding.

In reference to the motion for discretionary abstention, I think the standard is very strict that we should not abstain when we have a basis for jurisdiction, et cetera.

So, all of those motions are denied, but now I would like to hear your motions on the summary judgment.

I will let Siemens go first.

MR. ROCHELLE: We begin in 1978, because that's when the first important event took place, with the purchase by Siemens of a division of Allis Chalmers known as the Electrical Products Group.

It was a division, it was not a separate corporation, it was just a division of a much larger company.

This Electrical Products Group manufactured things known as regulators.

Now, I don't myself exactly know what [p. 8] regulators are because I never went to engineering school, but from having seen at least pictures of some of them, they look sort of like transformers and things you see sitting on the top of telephone poles or outside of plants that regulate voltage and things of that sort.

This is the business that was purchased in 1978.

Later, of course, in '88 or 87, Chalmers is in bankruptcy, it confirms its plan in 1988 and then a year after confirmation Siemens enters into a settlement agreement with our good friends at Allis Chalmers.

This settlement agreement was a fairly long document, ultimately as you know approved by Judge Lifland about a year after confirmation, and there is one paragraph in that agreement which is pertinent to what we are here for today.

That is a paragraph under which Siemens indemnified Allis Chalmers and the Trusts for certain claims.

I must emphasize the fact that it was an indemnification only for certain claims, because we can't rely on our familiarity with what business [p. 9] people usually do when they buy companies or divisions of companies from other companies; because we know that very often the acquiring company will indemnify the seller for basically all claims that arise in connection with that business that was purchased.

I suppose in my experience that has been the more typical form of an indemnification, if there is one, and

particularly so when you are buying assets as opposed to the stock of a company, and that's what this was, this was a classic asset deal.

But Siemens did not indemnify for all claims related to this Electrical Products Group.

What they indemnified for was claims, and I quote, "relating to the conduct of the business of the former Electrical Products Group."

Then following that is a bunch of includings, which we could get into, but I think we have to look at the language that I have just been referring to because that is what controls even the including language.

Now, I would like to note what the important words are.

They are the following three words, [p. 10] it's relating to the conduct. It doesn't say relating to the business of the Electrical Products Group, it says relating to the conduct of the business, and the word business is also a very important word.

it doesn't merely say relating to the former Electrical Products Group, it says relating to the conduct of the business, and then there is also that very important word in there, former.

It doesn't say relating to the conduct and business of the Electrical Products Group, because if you had said the business of the Electrical Products Group, that probably would mean the business that we are conducting today, because that still is the Electrical Products Group.

But they were very careful to use language, the business of the former Electrical Products Group of Allis Chalmers, because that's what they are talking about.

We indemnified for certain claims relating to that business back when it was operated by Allis Chalmers, that is what is meant by former Electrical Products Group.

Because as we'll know in a minute when [p. 11] we get into the law on indemnification, you've got to give meaning to all of the words in an indemnification and you've got to construe them very narrowly.

So those words, conduct, business and former Electrical Products Group, are all really quite important to all of these issues on summary judgment.

Now, as I said, the law, even from the time of Queen Elizabeth has required us to interpret indemnifications strictly and, as the Courts say, within the narrow literal words of the indemnification.

Now, in 1990, a couple of years after confirmation and a year after this indemnification was written, an employee of Siemens by the name of Rodriguez was injured using a piece of equipment that had been purchased from Allis Chalmers and installed in the plant.

This piece of equipment, what is known as a test bench, and I suppose if summary judgment requires that I know what a test bench is, I guess we lose, but again I am not an engineer.

THE COURT: I think the Court knows [p. 12] what a test bench is.

Was this a step-down or a step-up regularity?

MR. COGAN: That's a very good question, I believe it was a step-up.

THE COURT: That's probably why he got shocked. Go on, the Court knows what it is.

MR. ROCHELLE: In any event, what he was injured on was the test bench, not the regularity [sic] itself, because the test bench that is the subject of this claim made by Mr. Rodriguez was manufactured by a separate division of Allis Chalmers.

The division was known as the Advanced Technology Group.

It was not manufactured by the Electrical Products Group, but by an entirely different division of Chalmers.

This test bench has had an interesting history. It was first ordered before the acquisition closed, it was first delivered to the plant before the acquisition closed, but the cottin [sic] picking thing didn't work right, and so it was packed up and it was sent back to Allis Chalmers, to the Advanced Technology Group, where it sat at the time the [p. 13] transaction closed.

Then sometime in the middle part of 1978, after the closing and after Siemens owned the business, it was shipped back, reinstalled; this time it worked.

Now, looking at the all important statements under Section 13(h) for disputed issues of fact, we may have a disputed issue of fact with regard to whether the test bench before the date of the acquisition was used in the conduct of the business.

So I, to propose summary judgment today, have got to look at whether we can prevail on summary judgment, even admitting that there is a disputed issue of fact about whether this test bench, which had not been accepted until after the closing, had been used in the business of the former Allis Chalmers Electrical Products Group, meaning the business before the acquisition.

THE COURT: Look, counsel, Mr. Rochelle, when you talk about the word accepted, are you talking about the word accepted in a UCC sense or are you talking about accepted in what most people understand? Because one of the things I noticed, and [p. 14] this is not really fully discussed, is the approach of ownership and title, et cetera.

MR. ROCHELLE: That is not raised in either of our 13(g) Statements, if I can recall.

THE COURT: I know, It was shipped and was there a rejection notice sent out saying "We reject this, you shipped non-conforming goods"?

What was this about?

MR. ROCHELLE: It apparently did not meet the specifications and did not operate properly.

THE COURT: They have a right to cure, but ownership may have transferred.

MR. ROCHELLE: Without looking at the 13(g)s I can't tell you whether either of us have raised that.

THE COURT: I don't think you did. I just want to make sure I was clarifying what I was reading and what wasn't there.

MR. ROCHELLE: I think you are, and I think we at least didn't get into that because I think at that point you may be getting into areas that are beyond reaching on summary judgment and there was some intention of not getting into that.

THE COURT: Okay.

[p. 15] MR. ROCHELLE: We've got to focus on the indemnification and the nature of the claims made against Siemens and Allis Chalmers.

Now, as I said, the man was injured in 1990 and he sued Siemens and he sued Allis Chalmers.

Later the product liability Trust was substituted as a Defendant on behalf of Allis Chalmers.

Now, we, Siemens, got sued as the employer and the owner of the equipment, the test bench that injured this chap, because if you look in the Complaint, there is nothing about the regulater that was being manufactured that hurt the guy.

What he's complaining about is his injury was caused by this test bench, which was manufactured by this other separate division of Allis Chalmers.

Now, as I said said, [sic] Siemens was sued as the employer and the owner of the equipment.

Under Mississippi law, Siemens moved for dismissal from the lawsuit saying that Siemens liability is limited as the employer under Workers Compensation to demand Workers Compensation benefits.

As a footnote to that, I might add, and [p. 16] it's uncontested in our 13(h) Statement, that this man has

been paid over $800,000 in Workmans Compensation benefits already from Siemens, and with no doubt much more money yet to come in the future because he has been pretty thoroughly disabled.

Now, Siemens as a result was dismissed from the lawsuit without prejudice because its liability was limited under the Workers Compensation law.

That leaves Allis Chalmers as a Defendant in the case and it leaves other Defendants as well in the case.

Now, if you turn and you look at the Complaint, and the Complaint meaning the Complaint by Mr. Rodriguez and his wife, what you find is that they have sued Allis Chalmers as the manufacturer and the designer of this big piece of equipment.

They didn't sue them as the owner or the operator of it, but as the manufacturer.

It's almost as though you would imagine that General Electric had manufactured this test bench; all you would have to do in that count of the Complaint is just substitute the words General Electric and it would be pretty clear that they were [p. 17] suing the manufacturer of the equipment.

The manufacturer and the seller of the equipment, because if you look at all the words strung together in those sections of the Complaint, what you find is they were suing for the manufacture, design, sale, advertising, things of that sort, all of which had to do with the manufacture of the equipment.

As we know, of course, any time somebody is hurt in today's world you sue not only the people who own it but the people who manufacture it.

So it's really quite obvious that Chalmers is being sued because they manufactured this thing.

Now, we have stated in our 13(h) Statement that conclusion that Chalmers or the Trust is being sued as the manufacturer.

I do not see that any issue of fact has been raised on that topic, so I think given that indeed the Trust is sitting in that case as the Defendant in the capacity of the manufacturer of the equipment, and as I said before, it's not disputed that the Advanced Technology Group, whom we did not [p. 18] indemnify, are the ones who manufactured this large piece of equipment.

Now, in this Circuit, in the Haynes case from 1990, in the Court of Appeals, it has been held, as it always has been, that there must be an unmistakable intent, in the words of the Court, to indemnify before a third party such as us will be held liable.

Now, these being the background facts, none of which I think are in dispute, I think we need to look at the words of the indemnification and lay that down next to the Complaint.

Now, first off it seems to me that this is not a lawsuit dealing with the former Electrical Products Group, because, if anything, it is a lawsuit against the former Advanced Technology Group, but not the former Electrical Products Group, because it was the Advanced Technology Group which manufactured and designed this

large piece of equipment, and we did not indemnify the ATG, as it's called, only the former Electrical Products Group, and likewise, of course, we didn't indemnify Allis Chalmers generally; we just indemnified for claims arising from the conduct of the business of the Electrical Products [p. 19] Group.

THE COURT: Mr. Rochelle, let me just throw something out to you because of the way you have described this.

Are you not in a sense, at least under the set of circumstances right now, admitting that if it turns out under your definition that this test bench was produced by AEG, as – let me just get them right here.

MR. ROCHELLE: Advanced Technology.

THE COURT: (Continuing) – it was produced by ATG, then your theory is there would be no indemnification?

MR. ROCHELLE: Yes.

THE COURT: On the other hand, if it was produced by EBG, then you would be required to indemnify them? Is that not the issue here?

MR. ROCHELLE: That's one way of looking at it.

THE COURT: Don't you ultimately have to wait and see what happens as to what Mr. Rodriguez proves in his case?

MR. ROCHELLE: If I might say, that might be a very good reason why this lawsuit should [p. 20] be tried

to the same jury in Mississippi instead of doing everything twice in front of different juries.

But I think at this stage of the game we can simply look at his Complaint, because we indemnify for claims and that is the claim which has been made.

It is the manufacturer of that piece of equipment who is being sued.

THE COURT: But you don't know yet who actually ultimately is going to be found to be the manufacturer of that yet.

MR. ROCHELLE: I don't think that's subject to any dispute.

I do not see that our worthy adversaries have challenged our statement that the Advanced Technology Group manufactured this thing.

As I said, I do not see in their papers that they have challenged our undisputed statement of fact that they are sued as the manufacturer, so I think we are beyond that.

THE COURT: So you say you are actually up to what is the interpretation of the word "from any and all claims, losses, expenses or liabilities of any kind or nature now in existence or [p. 21] hereafter" – "hereinafter arising from or relating to the conduct of the business of the Electrical Products Group."

MR. ROCHELLE: Yes, that's what we have to look at, those are the key words, the conduct of the business of the former Electrical Products Group.

THE COURT: Explain to me what their relationship was then, maybe that's the thing I need to hear.

MR. ROCHELLE: The two entities, you mean?

THE COURT: Yes.

MR. ROCHELLE: They were separate divisions of Allis Chalmers; as I understand it, they conducted business from different locations.

Originally, as I understand it, Siemens purchased what was pretty much a separate – I think there may have been two or three plants, but they were separate plants where these regulators were manufactured.

The Advanced Technology Group was off somewhere else. They just happened to be someone in the market who manufactured a piece of equipment which was needed in the plant owned by the Electrical [p. 22] Products Group.

I think it is – it would be undisputed that the test bench was manufactured in a different location all together.

We are not trying to draw fictitious lines here where this little test bench was first made on one side of the plant and then delivered to another side of the plant in the same building; that wasn't the case.

As I understand it, it was manufactured in a different plant in a different part of the country and was sent back and forth a couple of times as they worked on it to try to make the thing work correctly, and there was, in fact, engineers from this Advanced Technology Group who were the ones involved in designing this complicated piece of equipment.

So we are not trying to play with silly distinctions here.

We've got very separate and distinct businesses operating in different locations making entirely different kinds of equipment.

So, thus I think the distinction is quite important between the manufacturer and the [p. 23] purchaser of the equipment.

As I said before, you have to look at this as though the test bench had been manufactured by General Electric, because for all intents and purposes that's what it was.

The parties, when they wrote this indemnification, could have written it with very different language.

They could have indemnified for claims relating to Allis Chalmers, or they could have written it to say – and this would be a typical in other transactions – that we could have indemnified for claims relating to the types of equipment manufactured at the time of the acquisition.

None of that kind of language was used.

They picked this very peculiar formulation that it has to be out of the conduct of the business of that manufacturing operation and before the time of the acquisition.

That's really what it comes down to, when you used different words to try to say the same thing.

So, putting all of those words together and trying to give them meaning, if you said, "Well, [p. 24] if General Electric had manufactured it, how in the Sam Hill could

we have indemnified General Electric? Because that's really pretty much what you have here if you change the words, but try to retain the meaning.

Because the former Electrical Products Group is all we indemnified and it had to be the conduct of the business of the former Electrical Products Group and that's not what Chalmers got sued for.

I don't see them disputing the fact that they are and were the manufacturer, and that's how they were sued.

THE COURT: Mr. Rochelle, what was the business of the Electrical Products Group?

What was it's business?

MR. ROCHELLE: They manufacture regulators, and I guess I am beginning to learn that in addition to your being an accountant and a CPA, you are also an engineer, but regulators is their business.

THE COURT: Well, if you produce a regulater, [sic] in order to produce a regulater, [sic] whether it be a step-up or step-down, you have to test it [p. 25] before it goes.

MR. ROCHELLE: That's right.

THE COURT: How did Allis Chalmers do that?

MR. ROCHELLE: Well, at the time of the acquisition they didn't test with this machine because it wasn't there. That, I think, is undisputed.

As I had said –

THE COURT: How did you get the machine again, the test bench?

MR. ROCHELLE: The timing worked like this. It was ordered from the Advanced Technology – I will call that the other division – it was ordered before the acquisition closed.

THE COURT: Right, and it was ordered by the EPG?

MR. ROCHELLE: Correct.

THE COURT: Okay. There is no dispute there was a purchase order, correct?

MR. ROCHELLE: No, no.

THE COURT: How did they order it?

MR. ROCHELLE: We have looked for a purchase order, but if I recall, no one has been able [p. 26] to locate it in the files.

THE COURT: You are not disputing that it was ordered before.

MR. ROCHELLE: No, not at all; in fact probably close to a couple of years before the closing, that we don't dispute.

As we said, it was initially delivered before the closing; they put the thing together, they tried to use it but it didn't work right, so they packed up, as we said in our papers, the heart and soul of it, basically the computer part of it, and sent it back to this other division of Allis Chalmers, which is where it was physically on the day of the closing on January 1 of '78.

Without its heart and soul on the premises, it was totally useless, couldn't be used for anything, it just sat there as part of the equipment gathering dust.

THE COURT: So you had – you still had the skeleton, so to speak, in Allis Chalmers, the Electrical Products Group had the skeleton, but the heart and soul was back at ATG.

MR. ROCHELLE: Yes, I think, as we said, in our 13(h) Statement, it was a useless piece [p. 27] of heavy metal at the time the acquisition closed, because without its brains and some of the electrical components, nothing works, and we have said that it was not in use.

THE COURT: You have had enough time. Let me hear what the other side has to say.

MR. COGAN: Your Honor, one day after we filed our last set of reply papers to these motions we were served with supplemental answers to interrogatories which we had served quite a bit earlier.

Included in the supplemental answers was some disclosure of the history of the machine.

As Your Honor understands, representing a Trustee you have to rely on the other side to give you that information.

What it sets forth significantly in those interrogatory answers is the bench was finally paid for, finally paid for by EPG of Allis Chalmers in 1977, before the transaction.

It goes on to say and was accepted by Siemens Allis, Inc. in or about mid 1978.

Now, I have the same question you put to Mr. Rochelle, I am not sure what acceptance means [p. 28] in that context.

If it's paid for, legal title is there with EPG and legal title is then transferred onto Siemens.

That to me is exactly what the indemnification agreement was contemplating.

As far as the argument that the machine was manufactured by a separate division, if Your Honor knows about test benchs,[sic] if you look at the affidavit of Mr. Malia hear [sic], it is very clear as to what went on.

EPG put in a request – it's not even a purchase order; there is no formal purchase, I think they call it an appropriation request – to its sister division saying "we need a particular test bench to do certain things."

It doesn't say, but I think the inference is clear, that there are specs that go with it, EPG wants it to do certain things; ATG then puts it together and sends it back.

Contrary to Mr. Rochelle's statements, although I don't think it's a material fact for this motion, Mr. Malia testified at his deposition in the Rodriguez case that the bench was at that time used [p. 29] by EPG; we have put that deposition before you.

The automatic feature which he calls the heart and soul, but which I don't think is the heart and soul, it's just a device that makes the machine of greater utility, was not there, but Mr. Malia testified that it was used manually.

I don't think any of that is important, because the fact of the matter is that taking Mr. Rochelle's example, if General Motors had manufactured this test bench and sold it to EPG prior to the Siemens Allis Chalmers transaction, and EPG had then transferred it as part of that transaction to Siemens, it would still be covered by this indemnification.

There is nothing unusual about this indemnification. It's a standard walk-away indemnification, because the seller, the transferor of the equipment, has no ability to control what Siemens is going to do with that equipment afterwards and therefore, Siemens takes the equipment and it takes the risk.

Whether it sat in EPG's closet or was in a repair shop at ATG, the fact of the matter is it was an EPG machine.

[p. 30] It could have been junked, Mr. Rodriguez would never have been injured and would never have sued anyone.

But it wasn't junked, it was transferred to Siemens and it was put into use, and that is what the parties contemplated when they gave an indemnification. Things are going to happen that Allis Chalmers would not be able to control.

As to the use of the phrase the former Allis Chalmers EFG, that's just a shorthand.

At the time they did this deal it was no longer the Allis Chalmers EFG, it was the Siemens EPG.

So what they are talking about is that group of assets that was owned by a division called EPG which was then owned by Allis Chalmers at the time of the original deal.

Now, I also want to point out to the Court that there are some contributions [sic] in the statements that have been made.

Again, we don't think that the facts are material here, but we do note, to the extent there is any factual issue, we have only put in statements of their people, so they cannot rely on [p. 31] their statements to raise a factual issue.

They stated quite clearly in their brief filed in April of this year, filed before you on Page 5, "EPG utilized a regulater [sic] test bench to test the integrity of its regulators."

Siemens acquired the test bench; again, we don't think it's material, whether they utilized it or not, but they have said they did.

Mr. Malia said the same thing in his deposition, so material or not, it's clear that they did, in fact, use it, and they can't take a contrary position at this stage.

The important thing is this was one of the assets transferred, it went over to Siemens, it was worth it to Siemens to take it, it was worth it to them to indemnify for any losses that they might have.

If I could have just one second, Your Honor.

THE COURT: Sure.

MR. COGAN: One more point. The Rodriguez Complaint is not limited to manufacturing the machine.

Again, we don't think it is material, [p. 32] but it definitely says in it that it's the manufacturing and testing of the machine.

If you take Mr. Malia's deposition testimony, he says more than one time "We tested the machine."

In fact, EPG was the one that put it into operation after that testing.

So to characterize the Complaint as being mere manufacturing is wrong, that's not what the Rodriguez Complaint says; and again, I have to emphasize, even if it did say it, it didn't matter, it was an EPG machine, that's what we were getting protection from.

THE COURT: Part of his Complaint, like the fourth count, talks about the installation, maintenance and provision of the advice for safe use.

Now, that certainly could bring in EPG.

MR. COGAN: That could, and –

THE COURT: Count two, first two.

MR. COGAN: (Continuing) – Any one of those counts, Paragraph 15, manufacturing, making, testing the machine; that could also bring in EPG.

That's why it doesn't make sense to view this indemnification in terms of individual [p. 33] pieces of equipment. There was a group of equipment, it went from EPG to Siemens; that's what the indemnity was for.

THE COURT: Okay, Mr. Rochelle, anything else, any brief rebuttal?

MR. ROCHELLE: Count four is not against Chalmers, so I don't see that that matters.

THE COURT: I am just saying the last count, just simply what the count is; I didn't say whether it was against Chalmers or not.

I am saying what he said in his count; liberal pleading, who knows?

MR. COGAN: I think that's important, Your Honor, it's a products liability Complaint and it's a kitchen sink Complaint.

THE COURT: I am not sitting here as an Appellate Court deciding what's going to happen to Mr. Rodriguez's lawsuit.

MR. ROCHELLE: Several things, and I will particular them off real quickly.

My adversary has endeavored to characterize what Mr. Malia said in his deposition.

Rather than do that, all I can do is suggest the Court read his deposition, and in [p. 34] particular the pertinent paragraphs which are excerpted in our reply brief. Enough said on that point.

Something he said that was of some import. My adversary said that this was a typical situation where we indemnified for the assets transferred.

We did not indemnify for the assets transferred, we only indemnified for claims arising from the conduct of the business as it existed at the time of the sale.

So, we have to get out of our minds what usually happens in asset sales, because this is not at all typical.

I think you will also see if you look at the deposition transcript that Mr. Malia didn't say that the thing was used.

Next, my adversary was making a reference to the fact that we indemnified for claims against the Electrical Products Group, and that's not accurate; we indemnified for claims arising from the conduct of the business.

Now, this man was not injured in the conduct of the business of that company when Chalmers [p. 35] owned it, he was injured in the conduct of a business twelve years later that was operated by Siemens.

That is an important distinction by all rights.

Then finally, looking at the Complaint, as I said, the claim which I think is count two against Chalmers, is the typical pleading that one would find against a manufacturer.

We, the owner and the operator, have already taken care of our liability under Workers' Compensation law, but that claim I guess, I believe it's the second claim, is just a typical common garden variety form book allegation that everybody on earth uses against – it's the first count, not the second count – it's the common allegation against the manufacturer.

Then there is a separate count entirely against Siemens as the owner and the operator.

Finally, with regard to the question of testing, because obviously anybody such as us who buys something tests it to see if it works, there is at minimum or maximum, I suppose, a question of apportionment of liability for testing.

The Plaintiff may assign liability for [p. 36] testing and at this stage in time you couldn't say whether it was testing performed by the purchaser or the seller, so that is I think beyond the pale right now to say that we are left absolutely liable for everything because we as the owner did some testing of the equipment.

That would have to await at minimum a trial, as the Court alluded to just fifteen minutes ago in the oral argument, but I don't even think we have to get that far.

All you have to do is look at the Complaint. What did they sue Chalmers for?

They sued them as the manufacturer, that's what we alleged in our 13(h) Statement, and there isn't anything in the – in any counter-statement by the Allis Chalmers folks saying "That that ain't so," that "there is a disputed issue of fact."

So I think just simply looking at it that the manufacturer was sued, that is enough in our judgment to give Siemens summary judgment.

THE COURT: All right, in reference to any preliminary statements, I think the Court has ruled that this is a core matter and as such I may [p. 37] enter a final Order, and that I have jurisdiction to hear this pursuant to 28 U.S.C., Section 1334(b).

This is, I think, one of the classic cases for summary judgment. There really are no facts, no material facts in dispute.

I think if you compare this to the uncontested facts submitted by both parties, I think the facts are pretty clear, and then I think that additional information which

was submitted by the interrogatories, although I don't think it was necessary, I think it just makes more clear as to what happened here, is that the bench was paid for and it was delivered.

I think the key issue here is the interpretation of what does it mean by the conduct of the business of the Electrical Products Group.

Now, in interpreting a clause like that, I know the parties – at least the moving parties in reference to Siemens – took bits and pieces out of it, but you have to take the entire agreement, the transfer agreement, which was approved by the Court and then the indemnification, and I will just read it into the record so it's clear, although I think the pleadings here are more than adequate: [p. 38] "Siemens Energy agrees to assume, discharge, indemnify and hold harmless Allis Chalmers Reorganization Trust and the Product Liability Trust from any and all claims, losses, and expenses or liabilities of any kind or nature now in existence or hereafter" – and I think in the transfer agreement it was "hereinafter," but I guess it means the same – "hereafter arising from or relating to the conduct or [sic] of the business of the former Allis Chalmers Electrical Products Group, including but not limited to those relating to products, including parts, manufactured or sold, or services of the kind provided by the former Allis Chalmers Electrical Products Group as of January 1, 1978, including any predecessor models or versions of such products, regardless of whether the date of manufacture, sale or services was before or after January 1, 1978, in which a defect in such product was asserted."

What has given rise to this declaratory judgment action is that an electrical regulater [sic] test bench was installed in EPG's Gadsden, Alabama plant in 1977, was utilized by EPG, the Electrical Products Group as part of the conduct of its business, and was one of the assets obtained by Siemens under the asset [p. 39] transfer agreement.

Now, I make that finding that it was one of the assets and I think that just adds to how the summary judgment motion will go; because the state of the facts are that the test bench was ordered inter-divisionly and it was delivered.

What was wrong with it, I don't know, but it was delivered, and although I am not so sure of Mr. Rochelle's description of it, whether the skeleton remained and the heart and soul went back; the fact of the matter is that the test bench, in some form or another, was part of the business of EPG prior to this indemnification agreement.

But more importantly is that in fulfillment of whatever agreement there was, it ultimately came back and it had previously been accepted by EPG.

As such, it was not only an asset of EPG, but it was also something that was used in the conduct of its business.

Taking that conclusion, which I think is really undisputed, the including but not limited to clause of the indemnification agreement is not a limiting clause, but it's really an expansive [p. 40] clause.

Indemnification agreements are supposed to be interpreted very strictly, and I am interpreting it strictly. However, the including but not limited to obviously includes this work bench for which Siemens guaranteed or promised to indemnify the Trust here.

So in that regard I am going to grant summary judgment for the Trust and deny summary judgment for Siemens, and direct that Siemens pay for defense of the action, or alternatively pay for what's been taken place so far and substitute themselves in defense of the action, and I will leave that up to the parties to decide how they want to do it, because I wasn't sure what you were requesting.

I think it was an either/or proposition.

MR. COGAN: We are requesting indemnification both for what's been expended and what will be extended, including not only costs of defense but judgment.

THE COURT: You may want to give them the opportunity to assume their own defense, that's up to you.

[p. 41] MR. COGAN: We can talk about that and perhaps settle a judgment, if that would be all right.

THE COURT: Yes, and serve it on Mr. Rochelle.

MR. ROCHELLE: Thank you.

MR. COGAN: Thank you, Judge.

THE COURT: It's always a pleasure to have enough information to make a decision.

MR. COGAN: Thank you, Your Honor, we appreciate it.

THE COURT: Thank you.

[p. 42] CERTIFICATE

I, STEPHEN J. MOORE, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth, and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Stephen J. Moore

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case
HARTMAN MATERIAL HANDLING SYSTEMS, INC.,	:	Nos.: 87 B 11225 through
ALLIS-CHALMERS CORPORATION, d/b/a AMERICAN AIR FILTER COMPANY, INC., et al.,	:	87 B 11242 inclusive (BRL)
Debtors.	:	
BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST,	:	Adv. Pro. No. 92-1029A (referred to Hon. Francis G. Conrad)
Plaintiff,	:	
-against-	:	
SIEMENS ENERGY & AUTOMATION, INC.,	:	
Defendant.	:	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding having come before the Court on July 8, 1993, on the motion of the defendant to dismiss, and on the cross-motions of both parties for summary judgment, and the Court having rendered its decision on the record, it is hereby

ORDERED, that defendant's motion to dismiss is denied; and it is further

ORDERED, that plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied.

Dated: New York, New York
July 23, 1993

/s/ FRANCIS G. CONRAD
U.S.B.J.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11 Case
HARTMAN MATERIAL HANDLING SYSTEMS, INC.,	:	Nos.: 87 B 11225 through 87 B 11242 inclusive (BRL)
ALLIS-CHALMERS CORPORATION, d/b/a AMERICAN AIR FILTER COMPANY, INC., et al.,	:	
Debtors.	:	
BRUCE W. STRAUSBERG, as Trustee of the ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST,	:	Adv. Pro. No. 92-1029A (referred to Hon. Francis G. Conrad)
Plaintiff,	:	
-against-	:	
SIEMENS ENERGY & AUTOMATION, INC.,	:	
Defendant.	:	

JUDGMENT

This adversary proceeding having come before the Court on July 8, 1993, on the motion of the defendant to dismiss, and on the cross-motions of both parties for summary judgment, and the Court having rendered its decision on the record and having entered an Order, denying the defendant's motion to dismiss and its motion for summary judgment, and granting the plaintiff's motion for summary judgment, it is hereby

ORDERED, ADJUDGED AND DECREED that defendant SIEMENS ENERGY AND AUTOMATION, INC., is obligated to defend and indemnify plaintiff in the action entitled *Rodriguez v. Allis-Chalmers Corporation et al.*, pending in the Circuit Court of Rankin County, Mississippi (the "Rodriguez Action"), pursuant to the terms of the agreement between the parties approved by this Court by order entered on August 15, 1989; and it is further

ORDERED, ADJUDGED AND DECREED that defendant SIEMENS ENERGY AND AUTOMATION, INC. shall indemnify plaintiff for all losses, costs, damages and expenses incurred in connection with the Rodriguez Action, previously and hereafter, and for any judgment which may be entered in the Rodriguez Action against Allis-Chalmers Corporation, the Allis-Chalmers Corporation Product Liability Trust, and/or Bruce W. Strausberg, as trustee of the Allis-Chalmers Corporation Product Liability Trust in the Rodriguez Action.

Dated: New York, New York
July 29, 1993

/s/ Francis G. Conrad
U.S.B.J.

TITLE 28
JUDICIARY AND JUDICIAL PROCEDURE

§ 157. Procedures*

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration

of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

§ 1334. Bankruptcy cases and proceedings*

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of

the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

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* Effective for cases commenced prior to October 22, 1994, the date of enactment of the Bankruptcy Reform Act of 1994 Amendments.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re HARTMAN MATERIAL HANDLING SYSTEMS, INC., ALLIS-CHALMERS CORPORATION, et al., Debtors.	In Proceedings for A Reorganization Under Chapter 11 Case Nos. 87-B-11225 Through 87-B-11242 Inclusive (BRL)
In re the Claim of SIEMENS ENERGY & AUTOMATION, INC., Claimant.	Claim Nos. 88, 67638 and 68264

ORDER APPROVING SETTLEMENT AGREEMENT WITH SIEMENS ENERGY & AUTOMATION, INC. AND DISMISSING CLAIMS OF SIEMENS ENERGY & AUTOMATION, INC.

Upon the annexed Application dated July 5, 1989, of the Reorganization Trustee, by his attorneys, Foley & Lardner;

Upon the Settlement Agreement and Release ("Settlement Agreement") among Siemens Energy & Automation, Inc., Allis-Chalmers Corporation, the Allis-Chalmers Reorganization Trust and the Allis-Chalmers Product Liability Trust, a copy of which is attached to the Application as Exhibit A;

Upon the Debtors having provided due notice of the relief requested in the Application and an opportunity to be heard by serving the Application on July 14, 1989, on:

1) The holders of the ten largest Class 8 Claims other than Retiree Health Claims;

2) The Retiree Health Committee (UAW);

3) The Retiree Health Committee (non-UAW);

4) The Product Liability Trustee;

5) The holders of the ten largest Class 6 Claims;

6) The holder of the Class 10 Interest with the largest Adjusted Share of the distributions from Unreserved Equity Funds;

7) The holders of Class 11 Interests with the three largest Adjusted Shares of distributions from Unreserved Equity Funds;

8) The holders of Class 12A Interests with the three largest Adjusted Shares of distributions from Unreserved Equity Funds;

9) The UAW; and

10) The claimant, Siemens Energy & Automation, Inc.

IT FURTHER APPEARING that no other and further notice of the entry of this Order being necessary, and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

1. That Allis-Chalmers, the Reorganization Trustee and the Product Liability Trustee be and they hereby are authorized and empowered to enter into the Settlement Agreement, the terms of which agreement are hereby approved;

2. That Allis-Chalmers, the Reorganization Trustee and the Product Liability Trustee be and hereby are authorized and empowered to execute such documents and do such things as they may deem necessary or desirable to implement and effectuate the Settlement Agreement approved hereunder;

3. That Allis-Chalmers be and hereby is authorized to execute such additional documents as may be necessary to effectuate its approval of the agreement between Siemens Energy and the UAW with respect to Hawley Plant retiree benefits ("the UAW Agreement") and further that Allis-Chalmers has no obligations under the UAW Agreement to the UAW, Siemens Energy or any other beneficiary of the UAW Agreement should any term or obligation thereof not be fulfilled; and

4. That the claims of Siemens Energy & Automation, Inc., Nos. 88, 67638 and 68264, each filed on or about February 29, 1988, are hereby dismissed with prejudice, including the claim in the amount of $378,371.00, previously allowed pursuant to a Stipulation and Order, dated August 6, 1987, related to the Israel Electric Contract.

SO ORDERED.

Dated this 15 day of August, 1989.

By /s/ Burton R. Lifland
Honorable Burton R. Lifland
United States
Bankruptcy Judge

Allis-Chalmers's Plan of Reorganization

* * *

ARTICLE XI

Retention of Jurisdiction

11.1 The Court shall retain jurisdiction for the following purposes:

(A) to determine any and all objections to the allowance of Claims and Interests to the extent permitted by law and amendments to the Schedules;

(B) to determine any and all disputes arising under or relating to the Plan, the Retiree Health Trust Agreement, the Reorganization Trust Agreement, the Product Liability Trust Agreement and the Stock Sales Escrow Agreement (including, without limitation, regarding the effect of any release or discharge provided for herein or effected hereby);

(C) to determine any and all applications for allowance of compensation and reimbursement of expenses arising out of or relating to the Cases or any Claim or Interest;

(D) to determine any and all pending applications for rejection of executory contracts and unexpired leases and the allowance of any Claims resulting from the rejection thereof or from the rejection of executory contracts or unexpired leases pursuant to the Plan;

(E) to determine any and all applications, adversary proceedings and contested and litigated matters pending in the Cases on or prior to the Consummation Date;

(F) to enforce and administer the provisions of the Plan and to the extent expressly provided therein, the Exhibits thereto and the annexes to the such Exhibits;

(G) to modify any provision of the Plan to the full extent permitted by the Code;

(H) to correct any defect, cure any omission or reconcile any inconsistency in the Plan, the Exhibits to the Plan and annexes thereto, or the Confirmation Order, as may be necessary to carry out the purposes and intent of the Plan;

(I) to determine such other matters as may be provided for in the Confirmation Order or as may from time to time be authorized under the provisions of the Code or any other applicable law;

(J) to determine any and all applications authorizing the Debtors to sell AAF, A-C ESD and/or A-C Pump pursuant to Section 363 of the Code;

(K) to enforce all orders, judgments, injunctions and rulings entered in connection with the Cases; and

(L) to enter such orders as may be necessary or appropriate in aid of confirmation and to facilitate implementation of the Plan.

* * *